In the

Supreme Court of the United States

October Term, 1955.

No. 282

Alma Schultz, Administratrix of the Estate of August M. Schultz,

Petitioner,

v.

The Pennsylvania Railroad Company,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Questions Presented

The questions originally presented in the petitioner's petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit were as follows:

"1. Whether the Court of Appeals in affirming the judgment of the Court below erroneously differed with the opinon of the Court of Appeals for the Fourth Circuit in the case of *Sadler* v. *Pennsylvania Railroad*, 159 F. 2d 784 (4 Cir. 1947), which held that proximate cause need not be established by direct evidence but may be proved by circumstances and which also held that it was for the jury to determine the cause of the fall from

the reasonable inferences which cannot be said to be speculative.

2. Whether the Court of Appeals in affirming the judgment of the Court below erroneously deviated from the principles of law established by this Court in the case of *Lavender* v. *Kurn*, 327 U.S. 645, 66 S. Ct. 740, 90 L. Ed. 916 (1946), and in failing to grant a retrial and permit the case to go to the jury to settle the dispute by choosing the most reasonable inference and that this did not involve speculation and conjecture."

In the petitioner's brief on the merits a third question has been added:

"3. Whether the trial court erred in refusing to admit evidence concerning the hazards of crossing from tug to tug, and in refusing to admit other circumstantial evidence."

The respondent views the sole question presented as whether or not there is any evidentiary basis presented by the record from which a reasonable inference could be drawn that any negligence by the respondent contributed in whole or in part to the death of the decedent.

Statement

This action was brought pursuant to Section 33 of the Merchant Marine Act of 1920, popularly known as the Jones Act, (46 U.S.C., 688 et seq.) to recover damages for the wrongful death of petitioner's intestate husband allegedly caused by the negligence of the respondent.

The decedent was a 36 year old employee of the respondent. On December 25, 1949 he was assigned as a "watch fireman" on four of respondent's tug boats (R. 9) which were then moored abreast of each other alongside the south

side of Pier H on the Hudson River in Jersey City, New Jersey (R. 35). At the outer end of the pier which is approximately 600 feet long (R. 62), is a two story building which houses a crew dispatcher's office (R. 59 and R. 66). On top of the building are two huge flood lights each equipped with a 500 watt lamp with reflectors projecting light down on to the pier and its environs (R. 66). Six other flood lights also project light towards the pier from a point about 150 to 200 feet inland from the bulkhead of the pier (R. 63). These lights illuminate the entire pier and at least part of the boats moored alongside (R. 51, 55, 59, 62, 63, 65, 66, 67, 69, 74, 75, 78 and 79). The tugs which are approximately 96 feet to 100 feet long (R. 63) were moored abreast of the pier in tiers (R. 35). The four boats to which the decedent was assigned, the "Altoona", the "Fort Wayne", the "Princeton" and the "Williamsport", were in the third tier of boats from the outer end of Pier H (R. 59), approximately 275 feet to 300 feet towards shore from the building upon which the flood lights were located, (R. 59).

The "Altoona" lay alongside the dock, and the "Princeton", the "Fort Wayne" and the "Williamsport" were outboard of the "Altoona" in that order (R. 35). These four tugs had been tied up on the morning of December 24, 1949 and were not scheduled to work again until the morning of December 26, 1949, (R. 15, and 16). The decedent was the sole person assigned to watch these tugs during his tour of duty (R. 14) which was from 5 P.M., December 25, 1949 until 1 A.M., December 26, 1949 (R. 10, R. 12). On the night in question the tugs had been temporarily removed from navigation (R. 59); there was no crew or captain aboard (R. 14); no logs were being kept on any of the boats (R. 60); and no navigation lights were displayed (R. 68).

The duties of the decedent as a "watch-fireman" were in essence those of a watchman or caretaker. It was his duty to protect the four boats to which he was assigned; to maintain fires; to keep steam in the boilers; to clean the bilges; and in general to watch the boats (R. 18, R. 19). He worked an eight-hour tour (R. 10, R. 12); he slept ashore (R. 60); checked in and out of his job at the office on the dock (R. 60); had locker and cafeteria facilities available ashore (R. 60, R. 73); and was not permanently assigned to any of these boats (R. 13).

At about 4:00 P.M. on December 25, 1949 the decedent, who had left his home in East Rutherford, New Jersey at about 2:30 P.M. (R. 9), called the crew dispatcher, the witness Corcoran, and advised him that he would probably be late for his assigned tour of duty which was to begin at 5 P.M. (R. 10). Corcoran advised the decedent that there were no other men available and that if he did not report, the tour of duty to which the decedent had been assigned would be short (R. 10). He advised the decedent to continue on his way to work (R. 10), and, pending his arrival, Corcoran assigned another watch-firemen, the witness Barker, to check the four boats to which decedent would be assigned (R. 10). At approximately 4 P.M., Mr. Barker, in accordance with instructions received from Mr. Corcoran, went aboard the four boats to which decedent would be assigned, pumped up the boilers with water, threw coal on the fires and pumped the bilges (R. 35). Barker estimated that he had built the fires up to a point which would keep them going for an hour and a half to two hours (R. 36).

Barker completed this task at about 5:00 P.M. and as he was returning to the office he met the decedent walking down the dock and they reported together to the office some-

time between 5:00 and 5:30 P.M. (R. 36 and 37). The decedent after signing up for duty told Barker that he was going to get his work clothes out of his locker (R. 37). He then walked down the dock to check his boats (R. 11). He returned to the crew dispatcher's office at about 7 or 7:15 P.M. still in his street clothes and reported to the dispatcher that he had completed re-checking his boats and that he was then going to change his clothes and go to work (R. 11). He then left the crew dispatcher's office walking towards the shore in the direction in which the "Altoona" and the three other boats to which he was assigned were berthed (R. 12). That was the last time that anyone saw the decedent alive.

On January 31, 1950 his body was found floating in the water off Pier F clad only in his socks and underwear and clutching a flashlight in one hand (R. 28, 29). The decedent's shoes and clothes were found on board the tug "Altoona" together with his lunch which was in an unopened paper bag (R. 30, 31). There is not a shred of evidence as to how, why or where the decedent fell into the water.

The cause was tried before Judge David N. Edelstein in the United States District Court for the Southern District of New York. At the conclusion of all the evidence the respondent's motion for a directed verdict was granted on the grounds that the petitioner had failed to prove that any negligence by the respondent had contributed in whole or in part to decedent's death. Judgment was entered in favor of the respondent. The United States Circuit Court of Appeals for the Second Circuit affirmed the judgment. The cause is before this Court on a writ of certiorari.

Summary of Argument

A. The direction of a verdict by the District Court and its affirmance by the Court of Appeals for the Second Circuit does not conflict with the decision of the Court of Appeals for the Fourth Circuit in *Sadler* v. *Pennsylvania R. Co.*, 159 F. 2d 784 (4 Cir. 1947) and does not deviate from any principle of law established by this Court in *Lavendar* v. *Kurn*, 327, U.S. 645. Neither court below held that proximate cause could not be established by circumstantial evidence. The direction of a verdict in favor of the respondent and its affirmance was based upon the principle that there were no probative facts which could form an evidentiary basis for a conclusion that any negligence by the respondent contributed in whole or in part to the decedent's accidental death; and that in the absence of such probative facts the petitioner had failed to sustain the burden of proof required of her under the *Jones Act*, 46 U.S.C. 688 et seq.

The petitioner argues that the testimony with respect to insufficient ill mination in the place where the decedent was working; the testimony with respect to insufficient help; and the testimony with respect to the presence of ice on the four boats to which the decedent had been assigned presented an evidentiary basis which would support the conclusion that the decedent's death was contributed to in whole or in part by the negligence of the respondent. However, there is not a shred of evidence in the record as to how, where or why the decedent met his accidental death and since the petitioner does not claim that these conditions existed at all points where the decedent would normally be performing his work (the record clearly establishes this) there is no way of knowing how or where the accident

occurred and hence a conclusion that it was proximately caused by some negligence on the part of the respondent is completely unjustified.

The petitioner attempts to substitute a theory or a hypothesis as to how the accident occurred in place of evidentiary facts from which a hypothesis could reasonably be inferred. The petitioner's hypothesis is that while changing his clothes preparatory to going to work the decedent heard a loud hissing noise on the out-board tug indicating excessive pressure in the boiler of that tug and necessitating prompt action by the decedent thus causing him to rush across the 4 tugs in his underwear and socks. The petitioner argues that the decedent fell while hurrying back from the out board tug.

There is no evidence that any such noise as would be emitted by escaping steam and which could have been heard for one half of a mile, was ever heard by anyone on the night in question. The petitioner's theory still leaves unanswered the questions of where and how the decedent fell into the water.

The cases cited by the petitioner in her brief are clearly distinguishable on their facts from the case at bar in that in each of those cases the "where", "how" and "why" of the accident or death could reasonably be inferred by some direct or circumstantial evidence. In the case at bar there is a complete absence of any probative facts, established by direct or circumstantial evidence, which would permit a conclusion that the decedent's death was casually related to any negligence on the part of the respondent.

B. The question of the applicability of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 et seq., which was pleaded as an affirmative defense by

the respondent was never passed upon by the Court below. The nature of the decedent's duties clearly establish that he was not a member of the crew of any tug since he was not on board any of the 4 tugs primarily to aid in navigation; had no permanent connection with any of the 4 tugs to which he was assigned on the night in question; and the tugs had been temporarily removed from navigation. Under these facts it is respectfully submitted that the petitioner's sole and exclusive remedy is that provided by the Longshoremen's and Harbor Workers' Compensation Act.

ARGUMENT

POINT I

The decision of the Court of Appeals in the case at Bar is not in conflict with any decision of the Court of Appeals for the Fourth Circuit and does not deviate from any principles enunciated by this Court. In this action there is a complete lack of probative facts which would support a conclusion that any negligence by the respondent contributed in whole or in part to the accidental death of the decedent.

A writ of certiorari was granted in this action on a petition which alleged that the decision of the Court below was in conflict with a decision of the Court of Appeals for the Fourth Circuit rendered in *Sadler* v. *Pennsylvania R. Co.*, 159 F. 2d 784 (4 Cir. 1947); and that the decision of the Court below erroneously deviated from the principles of law established by this Court in the case of *Lavender* v. *Kurn*, 327 U.S. 645. An additional question concerning the propriety of the trial court's ruling in refusing to admit evi-

dence concerning the hazards of crossing from one tug to another and "other circumstantial evidence" has been presented in the petitioner's brief on the merits.

It is respectfully submitted that this additional question is not properly before the Court since it was not presented in the petition for the writ of certiorari. Cf. *Irvine* v. *California*, 347 U.S. 128, 129. In addition the petitioner never made a specific offer of proof with respect to this excluded evidence as required by Rule 43 (c) of the Federal Rules of Civil Procedure.

An analysis of the evidence in the case at bar clearly shows that the questions presented by the petitioner do not exist. *Sadler* v. *Pennsylvania R. Co.*, 159 F. 2d 784 (4 Cir. 1947), and *Lavender* v. *Kurn*, 327 U.S. 645, are clearly distinguishable on their own peculiar facts from the case at bar. The Court of Appeals in affirming judgment in the instant case did not hold that proximate cause could not be proved by circumstantial evidence and did not deviate from any principle of law enunciated by this Court.

The Court of Appeals, in the case at bar, held that there was a complete absence of any probative facts which would permit a reasonable inference that any negligence by the respondent contributed, in whole or in part, to the accidental death of the decedent. This Court explicitly stated in Lavender v. Kurn, 327 U.S. 645, 653, that in the absence of such probative facts the direction of a verdict is proper.

The case at bar is comparable to *Johnson* v. *Palmer*, 129 F. Supp. 202 (E.D.N.Y. 1953), affirmed 220 F. 2d 279 (2 Cir. 1955) cert. denied 349 U.S. 954; *Moore* v. *Chesapeake & O. R. Co.*, 340 U.S. 573; *Reynolds* v. *Atlantic Coast Line R. Co.*, 336 U.S. 207; and *Trust Co. of Chicago* v. *Erie R. Co.*, 165 F. 2d 806 (7 Cir. 1948) cert. denied 334 U.S. 845.

The plaintiff's cause of action under the Jones Act (46 U.S.C. 688 et seq.) is ~~founded upon~~ negligence. The plaintiff has the burden of proving that some negligence on the part of the defendant contributed, in whole or in part, to the accidental death of the plaintiff's intestate (45 U.S.C. § 51). An employer under this Act is not an insurer of the safety of its employees. *Tennant* v. *Peoria & Pekin Railroad Co.*, 321 U.S. 29, *Tiller* v. *Atlantic Coast Line R.R. Co.*, 318 U.S. 54. In directing a verdict in favor of the respondent the District Court stated that there was "some evidence of negligence" but not a shred of evidence which would causally relate such negligence to the accidental death of the decedent (R. 56). In affirming the direction of a verdict the Court of Appeals stated that the evidence of such alleged negligence was slight and perhaps at most only doubtfully sufficient to present a jury question as to the defendant's breach of duty but in addition stated that there was no showing whatsoever that the alleged negligent conditions were causally related to the accident (R. 83).

In attempting to establish that some negligence by the respondent contributed, in whole or in part, to the accidental death of the decedent the petitioner alleges that the respondent was negligent in assigning the decedent to watch four tugs instead of two tugs; and that the defendant was negligent in not providing sufficient light at the place where the decedent was performing his duties (Petitioner's Brief, p. 10).

There is also some reference in the petitioner's brief to an allegation that there was ice on board the four tugs to which the decedent had been assigned on the night of December 25, 1949.

Even assuming *ad arguendo* that these conditions existed, there is not a shred of evidence to show how any of these

alleged negligent acts are casually related to the accidental death of the decedent. There is no evidence of any kind, either direct or circumstantial, upon which a reasonable inference could be based, even if such facts be assumed, that insufficient illumination, ice on the tugs or an insufficient working force contributed in whole or in part to decedent's accidental death. The record is a complete blank as to how, why or where the decedent fell into the water. This void in the evidence prevents the formation of an evidentiary basis which would permit any kind of an inference that these facts, assuming they existed, contributed in whole or in part to decedent's death. *Johnson v. Palmer*, 129 F. Supp. 202, (E.D.N.Y. 1953) affirmed 220 F. 2d 279 (2 Cir. 1955) cert. denied 349 U.S. 954.

In the *Johnson* case, *supra*, the plaintiff's decedent was employed as a floatman on one of defendent's tugs which had been assigned to move 2 floats which were then moored to bridges on the East River. The decedent's duties consisted of releasing certain lines which secured the floats to the dock. He was last seen walking forward towards the bow of one of the floats presumably to cross over a bridge and release the lines on the second float. The captain and mate who were performing the maneuver heard a vocal signal indicating that the lines had been released but they were not certain as to whether or not the signal had been given by the decedent. In response to this signal the floats were backed away from the bridge.

Some two hours later, after the maneuver had been completed, the decedent's body was found floating in the water in the vicinity of the bridge to which the line on the second float had been secured. There was testimony that the defendant's tug captain had violated the custom and practice of the New York harbor in moving the floats. The Trial

Court directed a verdict in favor of the respondent on the basis of a previous decision of the Court of Appeals in the same case (*Johnson* v. *New York NH & H R. Co.*, 194 F. 2d 194 (2 Cir, 1952) revd. on other grounds 344 U.S. 48) which held that the absence of any evidence as to how or why the decedent had fallen over board represented a complete absence of probative facts which would support a conclusion that the respondent's negligence was casually related to the decedent's accidental death.

Similarly, in the case at bar there is no evidence of any kind as to how or why the decedent fell into the water and there is no evidence of any kind as to where the decedent fell into the water.

The petitioner attempts to distinguish *Johnson* v. *Palmer*, 129 F. Supp. 202 (E.D.N.Y. 1953) affirmed 220 F. 2d 279 (2 Cir. 1955) cert. den. 349 U.S. 954, by stating that the conditions alleged in the case at bar were "continuing ones which existed at all times when the circumstances indicate the deceased went overboard," (Petitioner's Brief, p. 20). But, as pointed out in the opinion of the Court below, the petitioner does not claim that the tugs or pier were completely covered with ice or were entirely shrouded in darkness (R. 84). Not knowing how or where the accident occurred it is impossible to conclude that it was proximately caused by these defaults even if it be assumed that these defaults had been clearly established.

With respect to the lighting conditions existing at the time it is conceded that the entire pier and at least portions of the boats were illuminated by the two sets of floodlights on the pier (R. 51, R. 55, R. 59, R. 62, R. 63, R. 65, R. 66, R. 67, R. 69, R. 74, R. 75, R. 78, R. 79). One of the witnesses, Stetson, testified that the pier was just like daylight and

that the lights lit up all the tugs at the dock (R. 66, 67); and another testified that there was sufficient illumination for him to observe ice on the bumping mats of the tugs berthed in the next tier (R. 78, 79).

The only witness who testified with respect to the existence of ice on the boats to which the decedent had been assigned was the witness Conlon (R. 56). Conlon had no duties in connection with the 4 tugs to which the decedent had been assigned (R. 79) and he admitted that the only place on which he observed any ice was the front bumping mats of the 4 tugs outside the bow (R. 79, 80). It is significant that none of the witnesses who were actually on board any of the 4 tugs to which the decedent was assigned testified to the presence of ice on the decks of the 4 tugs. Plaintiff's exhibit 12 in evidence (R. 82, 82a, p. 244 of Stenographer's Minutes) shows that the temperature recorded at Battery Place, N.Y.C. just across the river from Pier H, Jersey City, N. J. on the night of December 25, 1949 varied from 40 degrees at 5 P.M. to 42 degrees at midnight and increased from 43 degrees at 1 A.M., December 26, 1949 to 56 degrees midnight, December 26, 1949.

The allegation with respect to insufficient help in the case at bar is governed by the same principle as governed *Reynolds* v. *Atlantic Coast Line R. Co.*, 336 U.S. 207 in which case plaintiff's intestate, a railroad brakeman, had been killed when he fell between two cars of a moving train while crossing from one car to another. The defendant's negligence was alleged to consist of a failure on the part of the defendant to adequately clear its right of way of cane brush which obscured the decedent's vision, and a failure to supply sufficient competent help. It was alleged that as a result of both acts of negligence the decedent had to negotiate an additional crossing between moving cars so

as to station himself at a point from which he could be clearly seen by the engineer to whom he was to give a signal as part of a switching movement. There was no allegation as to what caused the decedent to fall between the cars. This court affirmed *per curiam* a judgment of non-suit entered on a demurrer to the complaint on the grounds that the facts alleged (permitting the right of way to become obscured and failing to provide sufficient help) did not show that the accident resulted proximately from the negligence of the defendent. The court pointed out that these acts of negligence had not caused the decedent to perform additional work more hazardous than that which he normally performed. Similarly in the case at bar particularly in the absence of any evidence as to how, why or where the decedent fell into the water there is no basis for a finding that even if there was insufficient help that it caused the decedent to perform work more hazardous than that which he ordinarily performed or was in any way causally related to his death.

The Supreme Court of Alabama in affirming the judgment of non-suit in the *Reynolds* case treated the allegation that the defendent had not furnished sufficient help as true but held that there was no showing of a casual connection between that fact and the death of decedent. *Reynolds* v. *Atlantic Coast Line R. Co.*, 251 Ala. 27, 36 So. 2d 102 (1948). It pointed out that the omission to supply adequate help without the intervention of a new or independent cause could not have produced the fall of the decedent. The same reasoning applies with equal force to the case at bar.

The allegation that there was insufficient help is neither supported by the evidence nor connected with the decedent's death. That the decedent's assignment to watch four boats was not unusual was attested to by the witness Corcoran

(R. 38). In fact, prior to decedent's arrival the witness Barker had been temporarily assigned to watch 7 boats (R. 35). The shortage of help at that time was clearly due to decedent's late arrival (R. 10).

Andrei, who "recalled" some talk of shortage of men, reported for work at 11:00 P.M. and went on board his boats at once (p. 38a). He testified that under certain conditions an extra watch-fireman would not be assigned to specific tugs immediately but would remain in the crew dispatcher's shack pending a definite assignment later in the evening (p. 16A). Thus, Andrei's recollection of a "shortage of men" is explained by the fact that an extra man was not kept in the dispatcher's office.

In asserting that the respondent was negligent in failing to provide sufficient help and sufficient illumination and then arguing that these alleged acts of negligence are causally related to the decedent's death, the petitioner in effect attempts to substitute a theory or a hypothesis in place of and instead of probative facts.

The petitioner's theory or hypothesis is that sometime between 7:00 P.M. and 11:00 P.M. while the petitioner was in his underwear and socks an emergency arose on the outboard tug, the "Williamsport" which required immediate attention. It is suggested that the emergency was created by an excessive amount of steam in the boiler on the "Williamsport" and the decedent hurried across the tugs to turn on the injector which would pump water into the boiler and lower the pressure. According to the petitioner it was while the decedent was hurrying back from the outboard tug that he fell and met his death by drowning. This theory has its genesis in the testimony that when Barker checked the "Williamsport" at 5:00 P.M. he had closed the

injector (R. 36) and when Andrei went aboard the "Williamsport" the injector was open although the boiler was not taking any water since it was full (R. 42). According to Andrei the injector had been open for about hours or since approximately 9:00 P.M. (R. 48).

The injector is operated manually, and is used to pump water into the boiler and to lower the pressure (R. 40). How long the injector is allowed to remain on depends upon the water supply; if there is plenty of water, it is left on for only a short time but if the water supply is low, it is sometimes left on for a period of an hour or two hours (R. 41).

The boiler is equipped with a safety valve to release excess steam pressure (R. 33, 42). When the steam pressure exceeds a certain maximum the safety valve "blows off" (R. 33) emitting a loud hissing noise which may be heard for one-half of a mile (R. 42, 52).

The most significant flaw in the plaintiff's theory is that there is not a shred of evidence or testimony that anyone heard a loud hissing noise such as would have occurred if the safety valve had suddenly "blown" as suggested by the petitioner. The fact that the boiler was equipped with a safety valve which would automatically lower the maximum pressure negates the speculation that even if the boiler had built up excessive steam, it would have required the decedent to rush across the four tugs in his underwear and his stocking feet.

The witness Barker testified that after he had attended the fires and boilers on the decedent's boats at 5:00 P.M., they would have lasted for an hour and a half to two hours (R. 36). The decedent finished rechecking his boats at approximately 7:00 P.M. which is the time about which, according to Barker's estimate, they would require atten-

tion. Is it not just as probable and as reasonable that the decedent opened the injector on the "Williamsport" at this time before he reported back to Corcoran's office. It is respectfully submitted, in view of Andrei's testimony that the boiler on the "Williamsport" was full of water when he first noticed the injector open at 11:15 P.M., that it would be impossible for Andrei to state how long the injector had in fact been on unless he knew how much water had been in the boiler before the injector had been turned on. Concededly he did not know this fact since he first boarded the "Williamsport" at 11:15 P.M.

It is respectfully submitted that the hypothesis advanced by the petitioner is completely without any evidentiary basis and is no more probable than any other theory or hypothesis which could be advanced leading to a conclusion that the plaintiff fell overboard. The balance of probability between the hypothesis advanced by the petitioner and any other hypothesis or guess as to what happened is, viewing it most favorably to the petitioner equal. In such a state of circumstances, the petitioner has failed to sustain the burden of proof that some negligence on the part of the respondent in whole or in part, contributed to the decedent's accidental death.

As stated by Mr. Justice Minton (then Judge Minton) in *Trust Co. of Chicago* v. *Erie R. Co.*, 165 F. 2d 806, 809 (7 Cir. 1948), cert. denied 334 U.S. 845:

> "* * * It is all speculation as to the manner in which the decedent met his death. That is the trouble with the plaintiff's case. One can speculate on how the accident happened, but where is the evidence as to how it did happen? Where is the evidence from which a reasonable inference could be drawn as to how it happened? Many reasonable hypotheses as to how the accident happened may be conjured up, but it is not reasonable hypotheses we are interested in, but evidence from which reasonable inferences may be drawn."

In that case the decedent railroad employee, working in defendant's yard, was last seen alive by his fellow employees crossing certain tracks. Shortly thereafter his mangled body, presumably run over by a train, was found 700 feet from the point where he had been last seen. No one saw the accident and there was no evidence as to how the decedent met his death except that he had been run over by one of defendant's trains, presumably by one which had been observed standing on the track a few minutes earlier. There was no evidence establishing at what point along the track the decedent was first struck, whether he was dragged any distance or whether the engine or all the cars or only a part of the cars passed over him. There was a directed verdict in favor of the defendant which was affirmed on appeal since there was a total failure of proof as to how the accident happened.

In the case at bar, viewing the evidence in the light most favorable to the plaintiff, there is a similar failure of proof as to how or at what point the petitioner fell into the water, and thus there is a complete failure of proof with respect to causally connecting any alleged negligence on the part of the respondent with his death. In the cases relied upon by the petitioner this gap or chasm in the evidence was not present and hence these cases are clearly inapplicable. In every case cited by the petitioner there was some evidence, either direct or circumstantial, as to how, where and when the plaintiff had been injured or killed.

Thus, in *Sadler v. Pennsylvania R. Co.*, 159 F. 2d 784 (4 Cir. 1947) while no one actually saw the decedent fall into the water he was found treading water between the two barges at a point near where a broken guard rail was found. At that point, from which it could reasonably be inferred that the decedent had fallen, there was admittedly no illumination.

In the case at bar there is no evidence, either direct or circumstantial, as to how the decedent fell or from where he fell. To decide that he fell as a result of any negligence on the part of the defendant, in the absence of any evidence as to how he fell, or at what point he fell, would be sheer speculation. Speculation or conjecture can not take the place of proof. *Galloway* v. *United States*, 319 U.S. 372.

In *Lavender* v. *Kurn*, 327 U.S. 645 the place of accident was indisputedly established as having occurred immediately adjacent to the defendant's railroad tracks at a time when one of defendant's trains was moving thereon. The nature of the plaintiff's injury or wound permitted an inference that it had been caused by a mail hook which was allowed to swing loosely from the outside of the train. The "when" and "where" of the accident were established by direct evidence. The circumstantial evidence permitted an answer to the question of "how" by the use of reasonable inferences based on the evidentiary facts. In the case at bar it is impossible by any reasonable inference based on the evidentiary facts to ascertain how, why or where the decedent met his accidental death.

In *Casey* v. *American Export Lines*, 173 F. 2d 324 (2nd Cir. 1949) the evidence that the decedent was burned to death and that the defendant had failed to maintain proper fire watches permitted the reasonable inference that if the defendant had maintained proper fire watches, the decedent could have been rescued. There is direct causal relationship between the negligent act in this instance and the death of the decedent which is not present in the case at bar.

In *McDonough* v. *Buckeye S.S. Co.*, 103 F. Supp. 473 (N.D. Ohio 1951) the decedent, in an intoxicated condition, was left lying on a dock by an employee of the defendant into whose duty he had been entrusted. Two weeks later

decedent's body was found floating in the water after an immediate search had failed to disclose anything other than decedent's hat at the place on the dock where he had been left. Under these circumstances nothing could be more reasonable than the inference that the decedent, abandoned in a drunken and helpless condition, fell from the dock into the water as a result of his having been negligently abandoned by the employee into whose care he had been entrusted.

In *Johnson* v. *Griffiths S.S. Co.*, 150 F. 2d 124 (9 Cir. 1945) the decedent fell into an open hatch of a "blacked out" ship. The place of the accident was established by the finding of the decedent at the bottom of the open hatch. In the case at bar there is no evidence as to where the plaintiff fell into the water.

In *Pearce* v. *Lehigh Valley R. Co.*, 157 F. 2d 252 (3 Cir. 1948) the place of injury was established by the direct testimony of the plaintiff as a narrow catwalk in an allegedly poorly illuminated portion of defendant's roundhouse. In *Brabazon* v. *Belships Co.*, 202 F. 2d 904 (3 Cir. 1953) there was also direct evidence as to how and where the plaintiff had sustained his injuries and there was direct evidence that at the point where the accident occurred there was insufficient illumination. In *Armit* v. *Loveland*, 115 F. 2d 308 (3 Cir. 1940) there was also direct evidence as to the place where the accident occurred and how the accident occurred. In *Boston & Maine R.R. Co.* v. *Cabana*, 148 F. 2d 150 (1 Circuit 1945) cert. den. 325 U.S. 873, the manner in which the accident occurred and the place where the accident occurred was established by direct evidence, the plaintiff having been struck by a backing locomotive while employed in the defendant's insufficiently illuminated roundhouse.

In the case at bar there is no evidence as to how, where or why the accident occurred and, paraphrasing *Lavender v. Kurn*, 327 U.S. 645, 653, there is a complete absence of probative facts which would support a conclusion that any negligence on the part of the defendant contributed in whole or in part to the decedent's accidental death. Hence there is no evidentiary basis which would justify a finding in favor of the petitioner on the issues in this record.

POINT II

Since the decedent was not a member of the crew of any vessel on the night in question but was in fact a harbor worker the petitioner's sole and exclusive remedy is that which is provided by the Longshoremen's and Harbor Workers' Compensation Act 33 U.S.C.A. 901 Et. Seq.

The Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C., 901 et seq.) provides a compulsory system of compensation, irrespective of the employer's fault, for disability or death resulting from injury to employees occurring upon the navigable waters of the United States, if the employer has employees engaged in maritime employment in whole or in part upon the navigable waters of the United States. The respondent operating tug boats, carfloats, etc. in navigable waters is an employer within the meaning of § 2, subdiv. (4) of the said Harbor Workers' Compensation Act and has complied with the provisions of said Act (R. 80 and 81). The respondent pleaded said Act on an affirmative defense but the applicability of the Act to the case at bar was never passed on.

The petitioner attempts to bring this action under the Jones Act, 46 U.S.C. § 688 et seq., by alleging that dece-

dent was "employed as a seaman on board the tug boat "Altoona", which was moored to the dock of the defendant" (paragraph Eighth of the complaint). The petitioner then argues that the decedent having been a seaman on said tug boat, was "a member of the crew" and thus within the exception of the Longshoremen's and Harbor Workers' Compensation Act, which concededly does not apply to "a master or member of a crew of any vessel" (33 U.S.C. § 902 (3)).

As stated in *Caramba* v. *Cape Cod S.S. Co.*, 123 F. 2d 991, 994 (1 Cir. 1971):

> "If the plaintiff is a 'seaman' under the Jones Act and a 'member of a crew' under the Longshoremen's Act, then he is free to sue under the Jones Act. If he is not a 'member of a crew' under the Longshoremen's Act, he must proceed under that Act and he is not entitled to maintain this suit under the Jones Act."

Thus, the petitioner, to bring herself within the provisions of the Jones Act must establish that the decedent was a "seaman" under the Jones Act and a "member of a crew" under the Longshoremen's Act. The duties which are being performed at the time of injury control, even though they may not be the duties ordinarily performed by the employee. Thus, in *Pennsylvania R. Co.* v. *O'Rourke*, 344 U.S. 334, 340, this Court stated as follows:

> "An injured worker's particular activity at the time of injury determines, of course, whether he was injured in the course of his employment within Section 902(2), and whether he was a member of the crew of the vessel within the exceptions of Sections 902(3) and 903(a)(1)." [Section numbers have reference to the Longshoremen's & Harbor Workers' Compensation Act.]

In the *O'Rourke* case, *supra*, p. 22, the claimant was a railroad freight brakeman whose duties only incidentally included work on defendant's floats moored in navigable waters. He was injured while releasing a hand brake on a freight car which was on a float in navigable waters. His exclusive remedy was held to be that provided by the Longshoremen's and Harbor Workers' Compensation Act, *supra* p. 21.

To the same effect is *Long Island Rail Road Co.* v. *Lowe*, 145 F. 2d 516, (2 Cir. 1944) where Mr. Justice Swan, speaking for the Court of Appeals for the Second Circuit, stated on p. 518:

> "An employee's duties on the day of the accident are the critical facts which should determine his status as a member of the tug's crew."

In the *Lowe* case, *supra*, the plaintiff's intestate ordinarily performed duties similar to a harbor worker on behalf of the Long Island Rail Road. On the day he met his death through drowning, however, he had been assigned to a tug in navigation as a first deckhand or mate. A claim was presented against his employer for death benefits under the Longshoremen's and Harbor Workers' Compensation Act. An award made by the Deputy Commissioner was set aside by the judgment of the District Court which was affirmed by the Court of Appeals. The sole issue presented was whether or not the decedent was a member of a crew of any vessel within the meaning of the statutory exceptions set forth in the Longshoremen's and Harbor Workers' Act. In determining this factor the Court stated that the only duties which were to be considered were the duties he was performing on the day he met his death and that these duties clearly established that he was a member of the crew.

In the case at bar, on the night that the decedent met his death, he was performing the duties of a watch-fireman assigned to watch four tugs as a watchman and to maintain steam in three of these tugs by keeping the fires alive (R. 24 and 25) and under the circumstances cannot be considered as having been a member of the crew of any one of these tugs.

In *Reyes* v. *A. H. Bull S.S. Co.*, 80 F. Supp. 223 (S.D.N.Y. 1948), Judge Liebell, in holding that the plaintiff was not a member of the crew but was in fact covered by the Longshoremen's and Harbor Workers' Act, listed certain factors as determinative. The plaintiff signed no ship's log; was not directed in his work by any of the ship's officers; worked under a foreman or boss ashore; had regular hours or a regular shift; received an hourly salary with extra payment for overtime; lived ashore; slept ashore; and got all his meals ashore, except lunch. He was a member of a maintenance gang getting the vessel in shape to sail; cleaning the ship and doing odd jobs. Judge Liebell held that even though the plaintiff held a seaman's certificate at the time of the accident, since he was not a "member of the crew", he could not maintain an action under the Jones Act.

These factors are equally applicable to the case at bar. There is no proof that the decedent held a seaman's certificate. He worked an eight-hour shift (R. 10 & 12); he slept ashore (R. 60); had cafeteria facilities ashore (R. 75); he performed no duties with respect to navigation on any of the tugs to which he was assigned as a watch-fireman and in fact these tugs had been temporarily removed from navigation (R. 15 & 16). He had locker facilities ashore (R. 60); his time records were kept ashore (R. 60); he was the only employee assigned to watch these four tugs (R. 14); and no log was kept on any of these tugs (R. 60).

This Court has enunciated the factors which are to be considered in determining whether or not an employee is or is not a "member of the crew", in *South Chicago Coal and Dock Co. v. Bassett*, 309 U.S. 251. The decedent employee had drowned after falling from a vessel of his employer in navigable waters of the United States. The vessel was a 310-ton lighter and the decedent was considered by the captain of the lighter to have been a deckhand. The Court of Appeals had reversed a District Court judgment which had enjoined an award under the Longshoremen's and Harbor Workers' Compensation Act, holding that since the decedent was not on board primarily to aid in navigation he could not have been a member of the crew. This Court affirmed pointing out that the decedent had performed such tasks as throwing the ship's rope in shoving off or making fast. He facilitated the flow of coal from his ship to vessels which it refueled. He occasionally did some cleaning of the boat. He did not work while the boat was en route from the dock to the vessel to be fueled.

The Court of Appeals thought that it was significant that his only duty relating to navigation was the incidental task of throwing the ship's line and that his primary duty was to free the coal if it stuck in the hopper while being discharged into the vessel being fueled. He was paid an hourly wage; signed no "articles"; slept at home; and his employment was somewhat akin to temporary employment although he had worked three weeks and it might have been possible that he may have been retained for years to come.

In affirming the decision of the Court of Appeals which held that the Deputy Commissioner had properly made an award under the Compensation Act, this Court held that the phrase "member of a crew" included what is commonly

known as the "ship's company"; and that it was meant to comprehend those who are naturally and primarily on board aiding in navigation.

Three primary requisites are involved:

(1) A "member of a crew" is one of those employees who are naturally and primarily on board to aid in navigation. *South Chicago Coal Co.* v. *Bassett*, 309 U.S. 251.

(2) One obviously can not be a "member of the crew" if the ship is not in navigation. *South Chicago Coal Co.* v. *Bassett*, 309 U.S. 251.

(3) There must also be a more or less permanent connection between the ship and the worker. *Caramba* v. *Cape Cod S.S. Co.*, 123 F. 2d 991 (1 Cir. 1941).

In the case at bar, none of these three factors are present: The decedent was on board the four tugs primarily as a watchman; the tugs were not in navigation; and the decedent had no permanent connection with any of the tugs. He was in fact an extra-watch-fireman who was ordinarily assigned to watch different tugs various nights of the week (R. 13).

The fact that there exists the possibility that at some time in the future the plaintiff might have been assigned to a tug in actual operation or that he had been so assigned in the past on occasion, does not entitle the petitioner to maintain an action under the Jones Act. *Desper* v. *Starved Rock Ferry Co.*, 342 U.S. 187.

In the *Desper* case the decedent had been employed as an operator of one of a fleet of motorboats carrying sightseers on a river during the summer months only. After the termination of his employment he had helped to lay the boats

up for the winter. He was re-employed in March and while helping to paint, clean and waterproof the boats, preparing them for navigation, he was injured. At the time of his injury none of the boats were afloat; none had a captain or crew and the work being done was the kind that would customarily be done exclusively by shore-base personnel. Decedent had been a seaman in the past and expected in the future to return to his employment as an operator of the boats and hence a seaman. At the time of his injury, however, the Court held he was not a seaman and hence could not maintain an action under the Jones Act. The fact that he had been a seaman in the past and expected to be a seaman in the future did not entitle him to maintain an action under the Jones Act.

In *Gonzales* v. *Riverside and Fort Lee Ferry Co.*, 43 F. Supp. 366 (S.D.N.Y. 1947), Judge Rifkind held that the libellant could not maintain an action under the Jones Act against his employer when his injury occurred while he was engaged in work customarily done by harbor workers despite the fact that he frequently held a position as a member of a crew. Judge Rifkind held that the duties of the libellant at the time of his injuries controlled.

The libellant in this action had been employed as a fireman on one or more of the defendant's ferry boats. He had frequently been employed also in such positions as demolishing ferry house; making appliances in workshop; radiating ferries by loading coal; cleaning ashes and boilers; maintaining steam in stand-by ferries; greasing ferry fenders and slip piles; and tending terminal grounds. He was injured while attempting to grease fenders of ferries owned by the defendant when he was caught between the piles of the pier and ferry boat.

Judge Rifkind pointed out that libellant was not employed under "articles"; he slept ashore and ate ashore; he received hourly wages. In addition, he had no duties directly connected with navigation of the ferries except on several occasions he had been a fireman or an oiler. He was under the direction of shore supervisor and not ship's officers. Judge Rifkind stated (43 F. Supp. 366) at p. 367:

> "These facts compel the conclusion that the libellant was not a member of the crew of the Tenafly."

It was held that the fact that the libellant had some time been a member of the crew was immaterial.

In the case at bar decedent was assigned as a watch-fireman to four tugs and under the facts, he can not be considered to have been a member of the crew of any of these tugs.

CONCLUSION

Since there are no probative facts which would support a conclusion that any negligence by the respondent contributed in whole or in part to the accidental death of the decedent and the opinion of the Court below does not conflict with any decision of the Court of Appeals for the Fourth Circuit or deviate from any principles enunciated by this Court and since the petitioner's sole remedy is that provided for by the Longshoremen's and Harbor Workers' Compensation Act the judgment of the Court below should be affirmed.

Respectfully submitted,

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On the Brief

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